IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 629

EDWARD M. BRYAN, et al.,

Petitioners,

vs.

A. A. CREAVES,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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INDEX

List of Authorities Cited.

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To the Honorable The Supreme Court of the United States:

Petitioners' statement of The Facts will be supplemented by respondent in conjunction with his Argument hereinafter set forth. At this point, the respondent will confine himself to the making of two pertinent observations:

1. The decision of the Circuit Court of Appeals for the Seventh Circuit was rendered in a *unanimous* opinion.

2. The petitioners failed or neglected to file a Petition for Rehearing before the said Circuit Court of Appeals.

Summary of Argument.

1. The decision of the Circuit Court of Appeals, with respect to the release of the alleged cause of action against the respondent, adheres to the decisions of the courts of Illinois. Under the settled and established law of Illinois, the release of the respondent's joint tort-feasors had the effect of releasing the respondent as to all causes of action asserted by the petitioners for or on account of the alleged tortious acts of the respondent and his joint tort-feasors. *Wallner* v. *Chicago Traction Co.*, 245 Ill. 148, 151; *Welty* v. *Laurent*, 285 Ill. App. 13, 14; *Guth* v. *Vaughan*, 231 Ill. App. 143; *Kilham* v. *Chaloupka*, 195 Ill. App. 182, 185; *Gore* v. *Henrotin*, 165 Ill. App. 222, 224; *Vigeant* v. *Scully*, 35 Ill. App. 44, 46; *Chapin* v. *C. & E. I. R. R. Co.*, 18 Ill. App. 47, 50.

2. The rule of law, that the release of one joint tort-feasor operates as a release of the other joint tort-feasor, established by the Illinois decisions and applied in the case at bar by the Circuit Court of Appeals, is founded on sound public policy and is a salutary rule of law. *Chapin* v. *C. & E. I. Ry. Co.*, 18 Ill. App. 47, 50; *Farmers' Savings Bank* v. *Aldrich*, 153 Ia. 144, 133 N. W. 383, 386; *Rust* v. *Schlartzen*, 175 Wash. 331, 27 Pac. (2nd) 571, 573; *Sercey* v. *Hans Rees Sons*, 155 N. C. 296, 71 S. E. 310, 311; *McBride* v. *Scott*, 132 Mich. 176, 93 N. W. 243, 245.

3. The rule that a release of one joint tort-feasor releases all is applicable to joint torts of trustees. *First & Merchants National Bank* v. *Bank of Waverly*, 170 Va. 496, 197 S. E. 462, 465; *Farmers' Savings Bank* v. *Aldrich*, 153 Ia. 144, 133 N. W. 383, 385; *Braswell* v. *Marrow*, 195 N. C. 127, 141 S. E. 489, 491; *Whitford* v. *Reddeman*, 196

Wis. 10, 219 N. W. 361; *DeCock* v. *O'Connell*, 188 Minn. 228, 246 N. W. 885, 887; *Gibbs* v. *Redman Fireproof Storage Co.*, 68 Utah. 298, 249 Pac. 1032, 1034.

4. The petition for a writ of *certiorari* fails to show wherein the decision rendered by the Circuit Court of Appeals for the Seventh Circuit is in conflict with the decision of any other circuit court of appeals on the same issue as that involved in the case at bar.

5. The said petition for a writ of *certiorari* fails to show wherein the decision of the Circuit Court of Appeals is in conflict with the decisions of the Illinois courts on the same issue as that involved in the case at bar.

6. There is no conflict between Illinois law and Indiana law in the case at bar. Illinois is the State wherein the alleged tortious acts of respondent took place and wherein action was instituted against respondent, and, therefore, only Illinois law can control.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The "Agreement" of April 16, 1942, and the "Indenture of Agreement and Covenant Not To Sue" of April 29, 1942, given by petitioners to certain defendants in the Indiana suit were releases in substance and in form and operated under the Illinois Law to release the respondent from any liability to the petitioners.

The agreement of April 16, 1942 (Tr. 185), was merely captioned "Agreement" by the parties. Even if the parties had chosen to give it any other name, such action would not be conclusive on the court, and it would still be necessary to determine the actual nature of the agreement. Similarly, designation of the agreement of April 29, 1942 (Tr. 195) as "Indenture of Agreement and Covenant Not to Sue" is not binding upon the court, and the true nature of the instrument is controlling.

In *Jenkins* v. *Southern P. Co.*, 17 F. Supp. 820, 830 (reversed on other grounds in 96 F. 2d 405), we find:

> "An instrument must be given the effect it bears on its face. It is true * * * that when an instrument states specifically that it is a covenant not to sue, the court cannot interpret it in any other way, *and read into its words of release.* But the converse is also true, that is, if the instrument shows on its face that it is, in truth, a release of a particular claim, and the claim is identified, it amounts to a general release of the cause of action, although the word 'release' is not actually used. Here, three other verbs are used which,

actually, achieve a release, to-wit, *refrain from instituting, pressing, or in any way aiding.* And this release is intended to affect any other cause of action which may exist from the beginning of the world until the present time.

It is evident that when this is the result arrived at, the mere fact that the parties entitle an instrument of settlement a 'Covenant Not to Sue' means nothing. The instrument must be given the effect it bears. And when we interpret this instrument, in the light of the circumstances, and in the light of the fact that the cause of action was pending and coming on for trial; that a settlement was made; and $2,500.00 paid; that a dismissal was had; that the probate court approved and confirmed it, and authorized the settlement and the dismissal of the cause of action, we are confronted with a release.

To give to such instrument, under such circumstances, the effect of a mere covenant not to sue, would be allowing form to take the place of substance, and words the place of acts."

Under Illinois law the release of one or more joint tortfeasors releases the other, regardless of the intention of the parties; while a mere covenant not to sue has no such effect. (*Wallner* v. *Chicago Traction Co.*, 245 Ill. 148; *City of Chicago* v. *Babcock*, 143 Ill. 358; *West Chicago Street Railroad Co.* v. *Piper*, 165 Ill. 325; *Ennis* v. *Pullman Palace Car Co.*, 165 Ill. 161.)

The only controversy which arises under these rules is whether any given settlement agreement is a release, or a covenant not to sue. Some of the Illinois cases wherein the distinction between releases and covenants not to sue was considered are *City of Chicago* v. *Babcock*, 143 Ill. 358, *C. & A. Railway Co.* v. *Averill*, 127 Ill. App. 275, *Gore* v. *Henrotin*, 165 Ill. App. 222, and *Dixmoor Golf Club, Inc.* v. *Evans*, 274 Ill. App. 517.

In the *Babcock* case, the agreement was as follows:

> "It is hereby agreed that no action shall be begun against Joseph Le Cardi, by reason of any matters existing at this date, by the undersigned. Given for good consideration." (page 364.)

The court said (p. 366):

> "This, on its face, was simply an agreement or covenant not to sue."

The court indicated, however, that if the evidence had shown that the money paid for this agreement was received in satisfaction of the damages, there would have been an accord and satisfaction.

The agreement in the *Averill* case was (p. 278):

> "that she will not sue * * *; but it is hereby agreed and understood that this contract shall not be or be held or construed to be a release of any damages or right of action arising to said first party * * *."

On its face, the agreement did not purport to be a release even to the party to whom it was given. Very properly, therefore, the court said (p. 279):

> "The agreement in question is on its face merely a covenant not to sue; not a release or satisfaction of damages, but only a payment in part of the same."

In the *Henrotin* case, it was even held that parole evidence was admissible to show that complete settlement and release was intended, even though the contract, on its face, was just a covenant not to sue.

In the *Evans* case, the settlement memorandum showed receipt of a sum of money "as payment on account of the alleged liability of said S. K. Wheeler under the terms of said decree." Complainant agreed that before it would attempt to collect any additional moneys from Wheeler or attempt to enforce the decree against any money or

property owned or after-acquired by Wheeler, or pursue any other legal remedy to collect any additional sums under the decree, it would first exhaust its remedies against all the other defendants. The court said (p. 522):

> "This settlement was clearly not an accord and satisfaction. It was merely a payment on account, without releasing Wheeler from any further liability. His status, as jointly liable under the decree, was exactly the same as it was prior to the making of this agreement. All that the complainant did was to agree to suspend action against Wheeler until it had exhausted its remedies against the other defendants, reserving the right to call upon Wheeler for additional sums due under the decree. We hold that complainant made no settlement with Wheeler resulting in a release of its claim against the two other defendants, Weinberger and Kendrick."

Petitioners argue that an instrument which releases one joint tort-feasor, and reserves suit-rights against other joint tort-feasors, will be considered to be a covenant not to sue, and not a release. They argue specifically that the instruments here in question are not releases.

The cases cited by petitioners are those in which the language used released no one, and were thus cases of true covenants not to sue, and not releases at all. Such cases do not, therefore, prove, or even bear upon, petitioners' point.

Petitioners quote from paragraph 7 of the agreement of April 16, 1942 (Tr. 187), to the effect that the parties will not sue each other, and that rights of action against the respondent here shall remain unimpaired. Standing alone, that much of the agreement as is thus quoted by petitioners would constitute a covenant not to sue, and

not a release. Petitioners neglected, however, to quote the very first clause of said paragraph 7, reading as follows:

> "This agreement shall constitute a full settlement of differences and claims between the parties hereto,"

In discussing the agreement, petitioners also neglected to mention paragraph 14 (Tr. 190), which provides that "All claims of first parties against * * * Oxford Institute Bonus Account or the Trustees thereof * * * are merged in this agreement."; paragraph 17 (Tr. 191), releasing all claims to personal property of Damon Smith; and paragraph 18 (Tr. 191), agreeing to protect Smith against any and all liability to petitioners (and thus protecting Smith from third-party procedure in this action, by the respondent here).

In *Petroyeanis* v. *Pirola*, 205 Ill. App. 310, an agreement denominated "Covenant Not to Sue" was held to be a release and payment of judgment against both defendants, notwithstanding such was not the intention of the parties as expressed in the agreement. The injured person, having obtained a judgment against joint tort-feasors, entered into an agreement with one such tort-feasor which provided in substance that, in consideration of a stated payment, the complainant agreed to take no action, either in law or equity, or to prosecute any writ of execution to obtain satisfaction of the judgment from said tort-feasor in any form or manner whatsoever and agreed to be precluded "from asserting any rights against the said Chicago Railways Company he may have heretofore had to prosecute and collect his said claim for personal injuries to the undersigned against it."

In *Bee* v. *Cooper*, 217 Cal. 96, 17 P. 2d 740, seven former directors of a corporation and other participating parties

were sued for alleged fraudulent disposition of assets of the corporation pursuant to an alleged fraudulent conspiracy. The complaint alleged the fraud in detail, and it was further alleged that as a result of such fraud each of the defendant secured a portion of the diverted assets. Plaintiffs sought damages for the fraud.

In disposing of the case, the court said (p. 741):

> "The evidence shows that, subsequent to the commencement of this action, the plaintiffs and five of the defendant directors entered into a written 'Settlement Agreement' whereby, in consideration of said five defendants paying over to a trustee the respective portions or percentage of the money and other property received by them as the result of the alleged illegal and fraudulent conspiracy, the plaintiffs agreed to settle and dismiss this action as to said defendants. Thereafter, and pursuant to this agreement, five of the defendant directors did pay over said moneys to a trustee, and this action, at the request of the plaintiffs, was dismissed as to them. The agreement was not a mere covenant not to sue, as appellants would have us construe it. A reading of the instrument very definitely discloses that it was the intention of the parties thereto to fully settle, compromise, and dismiss the cause of action here sued on, in so far as certain defendants are concerned. * * * The dismissal was on the merits, and intended to settle the differences and obligations between the parties growing out of the cause of action set forth in the complaint."

Again, petitioners point out that the documents in this case expressly state that the petitioners here received in compromise less than the sum claimed. But that was also true in the *Cooper* case. The release there was given to defendants who paid over only "the respective portions and percentage of the money and other property received by them as the result of the alleged illegal and fraudulent

conspiracy." Appellants there, as the petitioners here, sought to have the instrument in question construed as a covenant not to sue, but the court refused to do so, saying (p. 742):

> "The agreement was not a mere covenant not to sue, as appellants would have us construe it. A reading of the instrument very definitely discloses that it was the intention of the parties thereto to fully settle, compromise, and dismiss the cause of action here sued on, in so far as certain defendants are concerned."

In the recent case of *Aiken* v. *Insull*, 122 F. 2d 746, (cert. denied, 315 U. S. 806), which case originated in the U. S. District Court for the Northern District of Illinois, we find (at page 752):

> "In our case the settlement agreement, read in its background of approval orders and confirmation decrees, discloses very definitely that the parties intended to settle and compromise the cause of action sued on, in so far as the banks were concerned. The debenture holders and the trustee in bankruptcy not only released their claims for damages against the banks, but they waived whatever interest they had in the collateral and confirmed title thereto in the banks. In return the banks cancelled the bank indebtedness of I. U. I., waived their claims against the estate of the bankrupt corporation, and paid almost $3,500,000 in cash. There can be no real controversy as to whether the settlement and compromise agreement was a release to the banks or merely a covenant not to sue the banks. We are satisfied that in substance (actual intent) as well as in form (language employed), the instrument constituted a release."

Another, even later, case, which also originated in the U. S. District Court for the Northern District of Illinois, was that of *Reconstruction Finance Corporation* v. *Central*

Republic Trust Co., et al., 127 F. 2d 242, (cert. denied, 317 U. S. 660). There, in an action against stockholders of a closed bank, for $229,402.52 claimed chargeable to the bank on settlement of its accounts as Trustee, release of the bank as to any liability over $25,000, with a reservation, however, of the right to continue, against the stockholders, the claim for the excess over $25,000, and with a specific agreement that fixing of the bank's liability at $25,000 should not be deemed an adjudication of the extent of damages suffered, was pleaded by the defendant stockholders as a release of the action against them for such excess.

The court in discussing the case said (p. 244):

> "The master thought that * * * release of the bank also released the stockholders * * * regardless of the attempted reservation of the right to recover * * * from the stockholders.
>
> We agree that these conclusions of the master are sound and they are supported by the following authorities cited by him to the effect that * * * a release of one person releases the other in spite of any attempted reservation of rights against the other partners. *Rice and Wiley* v. *Webster*, 18 Ill. 331; *Benjamin* v. *McConnel*, 4 Gilman 536, 9 Ill. 536, 46 Am. Dec. 474. It is contended by appellant, however that the last two cases cited were overruled by *Parmelee* v. *Lawrence*, 44 Ill. 405. We think there is no merit in this contention."

Except for the added feature, here, of dismissal of the Indiana case **with prejudice**, the Insull case is quite comparable to the instant case. The settlement agreement there, as here, included an attempted reservation of rights against persons not parties to the settled suit. The settlement there was approved by the court. The settlement agreement here was dictated by the Master (Tr. 164), and

some of the settlement deeds here were submitted to the Indiana court for approval (Tr. 165). On page 750 of the opinion, the court said:

> "The settlement took the form of a petition embodying its terms, which was filed with the District Court having charge of the Chicago bank suits and of the bankruptcy case of I. U. I. On November 4, 1937, the District Court approved the petition, and in part (4) of its decree stated that 'The settlement and compromise set forth in paragraph 26 of said petition is fair, just and equitable.' On February 24, 1938, an order was entered in the consolidated case No. 12357, which confirmed the settlement, vested title to the collateral in the Chicago banks, and *enjoined the debenture holders from the prosecution of further suits against the banks.*" (Emphasis supplied.)

And, at page 752, we find:

> "There can be no real controversy as to whether the settlement and compromise agreement was a release to the banks or merely a covenant not to sue the banks. We are satisfied that in substance (actual intent) as well as in form (language employed), the instrument constituted a release."

The case at bar fits into the pattern of the cited cases which held that a release was effected and it differs considerably from the cases where agreements were held to be, merely, covenants not to sue.

The agreement of April 16, 1942 was negotiated in open court (Tr. 164). It provides, *inter alia*, as follows (Tr. 185-192):

> "Whereas, the parties hereto are parties plaintiffs and defendants in a certain litigation now pending in the district Court of the United States for the Southern District of Indiana, Indianapolis Division, being Civil Cause No. 405, and

Whereas, said parties are desirous of **composing and compromising their differences** without further litigation. (Emphasis supplied.)

No, Therefore, it is agreed by the parties, for and in consideration of their mutual agreements and further considerations herein expressed as follows:

(1) A Stipulation shall be entered into before the Special Master, disposing of the said action according to the terms of this memorandum.

(2) * * * (Provision for payment of court costs, trustee's fees, etc., 'and the fees of attorneys for Defendants' out of funds held in trust under court order.) 'Should there be a balance left in said trust, the same shall become the property of' Damon and Edith Smith.

(3) * * * (conveyance of farm lands, etc., subject to $20,000.00 of mortgages placed thereon pending the litigation) 'and said mortgages, assessments and taxes shall be assumed by first parties and third parties shall be released by first parties from all liabilities thereunder.'

(7) **This agreement shall constitute a full settlement of differences and claims between the parties hereto,** accruing up to this date, and the parties agree not to sue each other or the Oxford Institute or the National Funding Corporation on any claims accruing up to this date, involved in this cause or referred to herein. (Emphasis supplied.)

As to suits now pending in the United States District Court in Chicago, between certain of the first parties as plaintiffs and A. A. Creaves, Oxford Institute and National Funding Corporation, as defendants, it is agreed that no judgment shall be taken against either Oxford Institute or National Funding Corporation, and proper instruments shall be executed to safeguard said corporation accordingly, but the right to continue such actions to judgment versus A. A. Creaves shall remain unimpaired and this agreement shall constitute no release of any liability of said A. A. Creaves to any parties hereto.

(14) **All claims of first parties against** Oxford Institute or **Oxford Institute Bonus Account or the Trustees thereof** and all claims of Oxford Institute or Oxford Institute Bonus Account or the trustees thereof against first parties, occurring up to this date, **are merged in this agreement.** (Emphasis supplied.) (And note that the claim herein against Creaves is based on his having been a trustee of the Oxford Institute Bonus Account.)

(15) All shares of stock in National Funding Corporation belonging to the first and second parties and all such stock now deposited with the Clerk of the Court by said parties shall become the property of the third parties and shall be properly endorsed, and it is agreed that such stock, so deposited, is all the stock to which third parties are entitled from first parties. Said stock does not include the shares of stock now held by Burke E. Whitaker.

(17) **First parties release any and all claims to any livestock, chattels or other personal properties of the third parties or of Production Credit Corporation of Rushville, Indiana, and any claim of any interest in any assets of National Funding Corporation or Oxford Institute or third parties.** (Emphasis supplied.)

(18) **First parties shall protect, by appropriate agreement, Damon Smith, Edith Smith, Joseph Smith, Oxford Institute, and National Funding Corporation from any and all liability to first parties,** and the parties named shall protect first parties from any and all liability whatsoever, but nothing in this agreement shall constitute the release of any liability of said A. A. Creaves to any parties hereto. (Emphasis supplied.)

(19) It is further agreed that the claims asserted by the first parties against the third parties exceed the value of the land which is to be conveyed by the third parties to the trustee named for the use and benefit of the first parties, and **if any suits or actions are hereafter brought by any former Oxford Institute sales-**

man, or his duly authorized representative, to establish a trust in or impress a lien upon such land, or any part thereof, by virtue of any matter connected with his former employment as such salesman with Oxford Institute, such suits and actions shall be defended jointly by the first and third parties, each paying one half of such defense, and one half of any amount or amounts paid in settlement thereof, and one half of any final judgment rendered in any such suit or actions;" (Emphasis supplied.)

The provisions of paragraph 7, concerning the present action, that "no judgment shall be taken against either Oxford Institute or National Funding Corporation, and proper instruments shall be executed to safeguard said corporation accordingly," are wholly inconsistent with the theory or office of a covenant not to sue. This is particularly apparent when it is realized that the clause even effects an indemnification against third party action by the respondent here, and would necessarily eliminate any liability of the respondent, wherein judgment could be entered against the corporations as third party defendants in this action. The same observation applies to paragraph 18.

Probably no so-called covenant against suit ever went as far as the bold type portion of paragraph 19. This is not only *not* a covenant against suit, but actually a covenant to engage in future litigation, wherein either party might not otherwise be joined.

The agreement of April 16, 1942 (Tr. 185) was necessarily executory and preliminary in character, when drawn. The understanding expressed thereby, however, was wholly consummated, and it is now an executed agreement.

The real estate transfers and oil rights assignment to

petitioners, required by the agreement, were made by deeds and assignment from Damon and Edith Smith and by the trustee's deeds and assignment. The trustee's deeds and assignment were submitted to the Indianapolis court, and the court endorsed its approval thereon. (See Order, Tr. 193.) On the stipulation of the parties (paragraph 15 of the agreement, Tr. 190), the court ordered delivery of the National Funding Corporation stock to Damon and Edith Smith. (See Order, Tr. 194.) And then, **on stipulation of the parties** (Exhibit F, Tr. 198), **the court entered an order** (Exhibit G, Tr. 200) **dismissing the action, with prejudice as to the petitioners herein.** In further consummation of the agreement, petitioners moved, in the district court for Illinois, for dismissal of the defendants, Oxford Institute and National Funding Corporation, and such dismissal was granted, May 26, 1942 (Tr. 53 and 54).

The "Covenant", on which petitioners rely so heavily, must be taken for what it was—merely one step in consummation of the agreement of April 16, 1942. The "Covenant" is not, under the cases cited, a true covenant, but is merely evidence that the claim had *already* been extinguished. This is demonstrated by the following language from the "Covenant" (Tr. 195):

> "* * * whereas, under date of April 16th, 1942, the parties hereto entered into an agreement **completely compromising and disposing of all differences between the parties hereto,** which agreement was embodied in a stipulation made in open court in said Cause; and
>
> Whereas said stipulation and **agreement contemplated the exchange** of mutual covenants not to sue the parties thereto, and the exchange **of such assurances that the controversy between the parties had been finally terminated**; and
>
> Whereas said **Civil Action 405 was heretofore dismissed** by stipulation of the parties and by order of

> the Court **with prejudice against the revival of said action or any claims asserted therein.**" (Emphasis supplied.)

We can readily agree with petitioners that mere dismissal of a suit against one joint tort-feasor will not constitute a dismissal against other joint tort-feasors. But here, **the dismissal of Smith was with prejudice** (Tr. 200) and **such is not a mere dismissal.** We respectfully submit that the agreements and actions of the parties in the Indiana action effected a full release of Damon Smith and so, by operation of law, of the respondent herein.

Petitioners argue that effect should be given to the intention of the parties, when an instrument shows on its face an intention to reserve a right to sue some of the joint tort-feasors. The instruments here in question did, of course, express such intent. Such intent was also expressed, however, in the agreement considered in the cases of *Aiken* v. *Insull*, 122 F. 2d 746, and *Reconstruction Finance Corporation* v. *Central Republic Trust Co., et al.*, 128 F. 2d 242. A similar intent seems to have been expressed in the agreement considered by the Appellate Court for the First District of Illinois in the case of *Petroyeanis* v. *Pirola*, 205 Ill. App. 310. The expressed intent was not allowed to overcome the fundamental nature of the release in any of those cases.

The question was specifically dealt with in the *Insull* case, as follows (p. 752):

> "The controversy resolves itself into whether certain language contained in one paragraph of the release instrument, manifesting an intent to reserve the cause of action against the directors of I. U. I., is to be given effect. This paragraph provides that 'Nothing in this agreement of settlement and compro-

> mise * * * shall be construed to operate as a release or to affect any causes of action, claims or demands * * * against any person * * * other than any party to this settlement and compromise * * *' Of course the plaintiffs urge the application of *Parmelee* v. *Lawrence*, and the defendants the technical common law rule of release.
>
> We need only add, on the strength of our case-law analysis made earlier in the opinion, that the *Parmalee* formula is not applicable in tort cases. Hence we are compelled to conclude, as did the District Court, that the reservation of the cause of action against the former directors of I. U. I. was void because repugnant to the operation of the release. We believe, as do the plaintiffs, that Section 885 of the Restatement of the Law of Torts (1939), which has modified the Illinois rule of release, is the superior view in these matters, but our task is to apply the local law, not the Restatement."

The question was similarly dealt with in the *Central Republic Trust Co.* case.

Wholly aside from such controlling principle of law, it may be noted that petitioners' intention to dispose of their differences with Smith, and to reserve their claims, if any, against the respondent here, could adequately have been effected by a true and mere covenant not to sue, and by dismissal of the action against Smith without prejudice, rather than with prejudice, as was done.

The conclusive nature of the release effected by the parties is not changed because petitioners allegedly accepted in settlement less than the entire amount of their claim. Assuredly, less was paid than was claimed in all of the cases which held actions against joint tort-feasors barred by release of other joint tort-feasors; otherwise, there would have been no point at all to the filing of suit against

the other joint tort-feasors. Conversely, if the full amount claimed had been paid, the decisions barring further suit would have been specifically grounded on the fact that nothing remained to be paid. Actually, the principle that a release of one releases all is founded on the proposition that the amount paid for the release given is accepted in full satisfaction of the claim. (*Bee* v. *Cooper*, 217 Cal. 96, 17 P. 2d 740.)

By the settlement, petitioners waived many items which were recoverable from Smith. They permitted (Par. 2, Tr. 185) over $7600.00 of funds held by the trustee to be expended for payment of Smith's attorneys' fees, Master's fees, etc., which were all chargeable to Smith in the light of the court's order overruling objections to the Master's Report. They turned over to Smith (Par. 15, Tr. 190) their stock of National Funding Corporation. That act must be held to be voluntary for, even though tender of the stock might be required of them, delivery would not be required except on complete satisfaction of their demands. They released all claims (Par. 17, Tr. 191) to property of Damon and Edith Smith, Oxford Institute and National Funding Corporation; and, finally, they got 2733 acres of land (including oil land returning a royalty of $450.00 per month, per Heisler's statement on the argument in the lower court), unquestionably worth much more than any amount converted by Smith.

It but remains for the respondent to take passing note of the Illinois cases cited by petitioners under Point I of their argument. A cursory examination of these cases will serve to confirm the Illinois law on the subject; namely, that the release of one joint tort-feasor releases all, while a covenant not to sue releases no one. Thus in *City of Chicag* v. *Babcock*, 143 Ill. 358, (which is desigated by peti-

tioners as "the leading Illinois case on the subject"), the court said the following on page 366 of the opinion:

> "A release to one of several tort feasors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others."

In *West Chicago St. R. R. Co.* v. *Piper*, 165 Ill. 325, the court reaffirmed this same principle of law, saying on page 328:

> "A release to one of several joint tort feasors is a release to all, and an accord and satisfaction with one of them is a bar to an action against the others. (*City of Chicago* v. *Babcock*, 143 Ill. 358.)"

In *C. & A. Ry. Co.* v. *Averill*, 224 Ill. 516, the court construed the document in question as being purely and simply a covenant not to sue, saying on page 521 of the opinion:

> "It is next insisted by appellant that the release executed by appellee to the street car company was also a release of appellant, *under the well known rule that a release of one tort feasor is a release of both.* An examination of the record, however, does not bear out this contention, for the reason that the agreement between the appellee and the street car company *was not a release within the meaning of that rule.*" (Emphasis supplied.)

The petitioners aver, at page 21 of their Brief, that the Circuit Court of Appeals "erred further because its decision is contrary to the law of the State of Illinois. It is contrary to the decision in the case of *Vandalia R. R. Co.* v. *Nordhaus*, 161 Ill. App. 110." What is the principal of law followed by the Illinois Appellate Court in that case? It is set forth on page 113 of the opinion as follows:

> "A release to one of several joint tort feasors is a release to all and an accord and satisfaction with one of them is a bar to an action against the others. *City*

of Chicago v. *Babcock*, 143 Ill. 358; *West Chicago Street R. R. Co.* v. *Piper*, 165 *id.* 325.

A covenant not to sue one of two or more tort feasors does not operate as a release of any of them and they cannot invoke the covenant as a bar to the action. *City of Chicago* v. *Babcock, supra; C. & A. Ry. Co.* v. *Averill*, 224 Ill. 516."

The last Illinois case cited by petitioners is *Wallner* v. *Chicago Consolidated Traction Co.*, 245 Ill. 148. However, it is difficult to perceive what degree of comfort can be gleaned therefrom by the petitioners. On page 151 of the opinion, the Illinois Supreme Court had the following to say:

"There is no doubt that a release of one of several joint tort feasors releases all and that an accord and satisfaction by one joint tort feasor has the same effect as to all. (*City of Chicago* v. *Babcock*, 143 Ill. 358; *West Chiago Street Railroad Co.* v. *Piper*, 165 *id.* 325.) It is equally certain that payment and acceptance of a sum of money in satisfaction of an unliquidated demand is a good accord and satisfaction. (*Ennis* v. *Pullman Palace Car Co.*, 165 Ill. 161.)"

The above five cases cited by petitioner must be taken as their strongest array of Illinois authorities to sustain their argument. The respondent respectfully submits that these cases forcibly serve to uphold his contention; namely, that the release of the Indiana defendants operated as a release of his alleged liability to the petitioners. Certainly the Circuit Court of Appeals, after reviewing all the Illinois cases applicable to the one at bar, arrived at the same inevitable conclusion—that the petitioners, in releasing the Indiana defendants and dismissing their Indiana action *with prejudice*, had received an accord and satisfaction and were barred from prosecuting the present action against the respondent.

II.

The decision rendered in the case at bar by the Circuit Court of Appeals for the Seventh Circuit is not in conflict with applicable decisions of other Circuit Courts of Appeals.

No decision of any other Circuit Court of Appeals is cited by petitioners in support of their claim that the decision herein is in conflict with the decision of other Circuit Courts of Appeals. The respondent, in turn, has not found any decisions of any other Circuit Courts of Appeals which do, in fact, conflict with the decision rendered herein, on the facts of this case.

The real point that petitioners are trying to make is that, assuming a difference between the laws of Illinois and the laws of Indiana, the agreements in this case, executed in Indiana (being the agreements of April 16, 1942 and April 29, 1942) must be *interpreted* under the laws of Indiana.

There are two vital weaknesses to this assertion. In the first place, this position is taken by petitioners for the first time in this Court. It was never raised by them in the District Court, nor in the Circuit Court of Appeals. As a matter of fact petitioners said, at page 12 of the Reply Brief filed by them in the Circuit Court of Appeals on June 25, 1943:

> "We respectfully submit that our contention that the documents in question are not releases, and that they have the effect of a Covenant Not to Sue are fully supported by authorities cited in our brief. *We come not to plead that the Illinois rule on this point be overruled; we ask that the Illinois law be followed in our case.*" (Emphasis supplied.)

Even in the Petition filed here (at page 27 thereof) they say:

> "Petitioners, in executing the two documents here in question, *were not unmindful of the Illinois law* and framed the documents so that they might be brought under the decision in the case of *C. & A. R. R. Co.* v. *Averill, supra.*" (Emphasis supplied.)

In the second place, the court's task is not to *interpret* the agreements, but to determine their effect, and the effect of petitioners' other actions. Respondent's actions, complained of by petitioners, are all charged to have occurred in Illinois and the suit against him was filed in Illinois. It is, therefore, the Illinois law under which a determination must be made as to whether he has or has not been released. Taken all together, the agreement of April 16, 1942, and the action of the parties thereunder, including the agreement of April 29, 1942, the making and acceptance of the various conveyances and transfers, the stipulation for dismissal of the Indiana action *with prejudice*, and the actual dismissal of that action *with prejudice*, clearly released respondent under the laws of Illinois, as heretofore shown.

The respondent fails to show that any conflict of laws exists in this case or that the Indiana law is in any manner applicable thereto. Illinois is the situs wherein the alleged tortious acts of the respondent were committed—the *loci delictus;* it also is the State wherein the petitioners instituted and maintained their action against the respondent—the *loci fori.* Can it seriously be contended, then, that the defenses available to the respondent are to be governed and controlled by what is alleged to be the law of Indiana? The respondent submits that this would be an anomaly without precedent or support in the entire history of legal jurisprudence.

III.

The termination of an equity suit in the Federal Court in Indiana by a dismissal thereof with prejudice, pursuant to a release of the defendants therein, will operate as a release of the respondent being sued in Illinois as a joint wrongdoer with the same defendants.

Lest there be any doubt whether the clothing of petitioners' action in what is, apparently, an equity action, affects the rule for release of a joint tort-feasor, we submit the following, from the case of *Bee* v. *Cooper*, 217 Cal. 96, 17 P. 2d. 740, 742:

> "* * * There is no room for argument upon the question as to whether this complaint is upon a cause of action *ex contractu* or upon one sounding in tort. While the appellants describe the action as one in equity to recover certain corporate assets alleged to have been improperly transferred by the board of directors, the action contains nothing more than a charge *ex delicto* against the directors and their co-defendants for fraudulently conspiring to divert the corporate assets. Applying to this case the reasoning employed in *Chetwood* v. *California Nat. Bank*, *supra*, there can be no doubt but that the cause of action here alleged sounds in tort, and that the several defendants are charged as joint tort-feasors. The gravamen of the complaint is the alleged collusion and fraudulent plan asserted to have been conceived and executed by the defendants for the purpose of diverting the corporate assts. It necessarily follows, therefore, that the release and discharge of some of the joint tort-feasors, in consideration of their payment to appellants of certain moneys for the loss and damage suffered by reason of the tort complained of, works a release of the remaining joint tort-feasors."

In *First & Merchants Nat. Bank* v. *Bank of Waverly*, 170 Va. 496, 197 S. E. 462, banks A and B qualified as executors and trustees of an estate. Thereafter, Bank A, as Trustee and with trust funds, purchased from itself certain mortgage notes. The notes were not collected at maturity, and not reduced to judgment. Thereafter Bank A was declared insolvent, and a receiver appointed. Bank C was appointed administrator and trustee in place of Bank A.

The parties interested in the estate ascertained that they had suffered a loss by the default of Bank A, and filed claim for such loss in the proceedings for A's liquidation. A's receiver answered, denying liability. The issues raised by the petition and answer were settled by the receiver agreein to pay the estate one-half of the total loss.

In an action against Bank B, the original co-trustee, for the other half of the loss, the court said (p. 465):

> "That the present action is one of tort can not be questioned. The notice of motion filed in the case is grounded upon the negligence of the defendant. There was but one single cause of action and it grew out of the wrongful conduct of the co-trustees. While the co-trustees are jointly and severally liable in tort for the injury caused by their negligence or misconduct, the satisfaction of the cause of action made by one for the mischief wrought discharges the other. It is similar in its operation to an accord and satisfaction. This is true, even though the parties did not intend to discharge the other joint wrongdoer. *Bland* v. *Warwickshire Corporation, supra.*"

In conclusion, the respondent submits that the dismissal *with prejudice* of petitioners' Indiana suit, pursuant to a release executed in favor of the defendants in that action, operated as a release of the respondent in the case at bar.

IV.

The Circuit Court of Appeals did not decide the case in disregard of the relationship between a trustee and a cestui que trust.

Under Point IV of their argument, the petitioners contend that the rules of construction governing release of ordinary tort-feasors should not be applicable to a case involving persons who stand in a fiduciary relationship. They quote from Perry on Trusts and Trustees, 7th Edition, Volume 2, pages 1452 and 1453, in an ostensible effort to sustain this position. The material quoted, however, does not support the principle claimed for by petitioners. Furthermore, the quotation as set forth by petitioners includes three asterisks to show omission of what would naturally be assumed to be irrelevant matter. Actually, what petitioners there omitted was the following:

> "A release of the principal in a breach of the trust is a release of all parties who would be liable secondarily or as sureties.", citing *Blackwood* v. *Burrowes*, 2 Con. & Laws. 478.

The claim asserted against the respondent here is surely a secondary liability to that of Smith.

Directly in point in response to petitioners' argument is the following, from *First & Merchants Nat. Bank* v. *Bank of Waverly*, 170 Va. 496, 197 S. E. 462, 465:

> "The rule of law, so well established in Virginia, by the cases referred to, is subject to no known exceptions. The fact that the wrong grows out of the mis-conduct of co-trustees constitutes no exception to the rule of which we are aware. These fiduciary wrongdoers are just as much joint wrongdoers as any other joint tort-feasors. There is just one cause of action

against them. When one of them satisfied that single cause of action the other was released. There can be no bar until there has been satisfaction for the wrong done (Code § 6264) but when once the wrong has been satisfied by one, that constitutes a complete bar to any action that may be instituted against the other."

In *Braswell* v. *Morrow*, 195 N. C. 127, 141 S. E. 489, complaint was filed to recover losses suffered by a corporation because of (a) negligent mismanagement by the secretary-treasurer, who was also a director, and (b) negligence and carelessness of the directors, in failing to supervise or restrain the secretary-treasurer, and require a proper performance of his duties. A settlement of the claim against the secretary-treasurer, releasing "all claims of whatsoever nature and kind" against the secretary-treasurer, was held to dispose of the claims against the directors.

To the same effect are the cases of *Whitford* v. *Reddeman*, 196 Wis. 10, 219 N. W. 361; *DeCock* v. *O'Connell*, 188 Minn. 228, 246 N. W. 885, 887; *Gibbs* v. *Redman Fireproof Storage Co.*, 68 Utah 298, 249 Pac. 1032, 1034.

At page 37 of their brief, petitioners claim that they had no knowledge, at the time of the Indiana suit, of the profits claimed to have been made by the respondent here. This contention is controverted by their own statement, at page 8 of the petition filed herein, that the allegations which appear in the amended complaint in this suit and which did not appear in the complaint filed in the Indiana suit were based on the testimony of the defendants in the Indiana suit. Further, an inspection of the Master's Report in the Indiana case will conclusively demonstrate that petitioners knew all of the facts here claimed upon when they settled that case. The settlement was negotiated by counsel, with the assistance of the court, at the conclusion

of hearings which ran on for weeks (Tr. 70-71) filling a Transcript of over 2500 pages (Tr. 223) and resulting in a Master's Report of 142 pages (Tr. 70-144). It is clear that petitioners knew the material facts and their rights thereon.

CONCLUSION.

The case at bar has been decided adversely to petitioners by both the District Court and the Circuit Court of Appeals in a unanimous opinion. The petitioners even failed to avail themselves of their opportunity to file a Petition for Rehearing before the Circuit Court of Appeals; yet they now petition for a writ of *certiorari* without showing a single substantive ground for the assumption of jurisdiction by this court.

The major issue that petitioners argue, and an issue which they seek to raise for the first time before this court, is whether the defenses available to the respondent are to be governed by Illinois law or Indiana law. Unquestionably Illinois law does control; and it would seem that if petitioners had considered their point meritorious, they would have raised it in the lower courts in the first instance.

The petitioners have received an accord and satisfaction, have seen fit to release the Indiana defendants and have dismissed their Indiana action with prejudice. The fact that they likewise released the respondent by so doing does not detract from the benefits accruing to them by reason of their having concluded their Indiana litigation. Certainly it should not serve as an incentive to protract the litigation against the respondent in Illinois, since protracted litigation is neither a means to an end nor an end to a means.

Wherefore, the respondent respectfully submits that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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